STATE OF MICHIGAN

COURT OF APPEALS

CARL TROSIEN,

Plaintiff-Appellee,

v

BAY COUNTY,

Defendant-Appellant,

and

DAVID GILL,

Defendant.

UNPUBLISHED
December 22, 2005

Nos. 257363; 257364; 257413
Bay Circuit Court
LC No. 03-003745-CZ

Before: Fitzgerald, P.J., and O'Connell and Kelly, JJ.

PER CURIAM.

Defendant Bay County (defendant) appeals by leave granted that portion of an order denying its motion for summary disposition pursuant to MCR 2.116(C)(10) of Count I of plaintiff's complaint alleging a violation of the Michigan Whisteblowers' Protection Act (WPA), MCL 15.361 *et seq.* (Docket No. 257363). Defendant also appeals by leave granted that portion of an order denying its motion for summary disposition pursuant to MCR 2.116(C)(8) of Count III of plaintiff's complaint alleging intentional infliction of emotional distress (Docket No. 257364). Defendant also appeals as of right that portion of an order denying its motion for summary disposition pursuant to MCR 2.116(C)(7) of Count III (Docket No. 257413). We reverse and remand for entry of an order granting summary disposition in favor of defendant.

Plaintiff, a former employee of Bay County's Civic Arena, filed suit alleging termination in violation of the WPA (Count I against Bay County), intentional infliction of emotional distress (Count II against defendant David Gill, an Arena employee and plaintiff's former supervisor), and intentional infliction of emotional distress (Count III against Bay county based on a theory of respondeat superior). As support for his claim in Count I plaintiff alleged that Gill harassed him by referring to him as "gay" and a "pedophile," and touching him on his buttocks. Plaintiff alleged that he reported this harassment, as well as instances of illegal activity that took place at the Arena (including employees and customers using or selling alcohol and controlled substances) to Thomas Tonkavich, the Arena's Director of Recreation and Youth Development, on numerous occasions, but that little or no action was taken to curb the harassment or threats or

to investigate the illegal activities. Plaintiff alleged that he told Tonkavich that if the issues were not addressed he would make a report to the police or an appropriate state agency. Plaintiff alleged that his actions in threatening to report violations of Michigan law constituted protected activity under the WPA, and that defendant violated the WPA by discharging him in retaliation for his participation in protected activity.

Defendant moved for summary disposition of Count I of plaintiff's complaint pursuant to MCR 2.116(C)(10). It alleged that plaintiff could not establish a prima facie violation of the WPA because no evidence showed that he reported or was about to report a violation of the law, plaintiff was not discharged for his statements, and plaintiff was discharged for a legitimate reason. The trial court denied the motion, finding that while no evidence showed that plaintiff actually reported a violation or a suspected violation of the law, a question of fact existed as to whether plaintiff threatened to do so. The trial court also found that a question of fact existed as to whether defendant's purported reason for terminating plaintiff's employment, that he engaged in violence in the workplace by threatening another employee, was pretextual.

Defendant also moved for summary disposition of Count III pursuant to MCR 2.116(C)(7) and (8). Defendant argued that it was entitled to summary disposition of Count III on the basis of governmental immunity, that it could not be held vicariously liable for an employee's intentional torts, and that plaintiff failed to state a claim for intentional infliction of emotional distress on which relief could be granted. The trial court denied the motion, finding that plaintiff had stated a claim for intentional infliction of emotional distress on which relief could be granted. The trial court also found that a genuine issue of material fact existed as to whether Gill's conduct constituted the intentional use or misuse of a badge of governmental authority for an unauthorized purpose. The trial court concluded that if Gill's conduct could be so characterized, defendant could be held vicariously liable under a theory of respondeat superior.

Docket No. 257363

Defendant first argues that the trial court erred by denying its motion for summary disposition of Count I because plaintiff failed to present evidence that he was about to report a violation or suspected violation of a law, regulation, or rule to a public body. This Court reviews the trial court's decision on a motion for summary disposition de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). In reviewing the decision on a motion brought pursuant to MCR 2.116(C)(10), this Court must view the evidence and all reasonable inferences drawn therefrom in a light most favorable to the nonmoving party and decide whether a genuine issue of material fact exists. *Trepanier v Nat'l Amusements, Inc*, 250 Mich App 578, 582-583; 649 NW2d 754 (2002). This Court also reviews de novo "whether a plaintiff set forth evidence to establish a prima facie case under the WPA." *Roberson v Occupational Health Centers of America, Inc*, 220 Mich App 322, 325; 559 NW2d 86 (1996).

Under the WPA, an employer may not discharge, threaten, or otherwise discriminate against an employee because the employee reports or is about to report a violation or suspected violation of a law, regulation, or rule to a public body. MCL 15.362. To establish a prima facie case under the WPA, "a plaintiff must demonstrate that (1) he was engaged in a protected activity; (2) the defendant discharged him; and (3) a causal connection between the activity and the discharge." *Chandler v Dowell Schlumberger, Inc*, 456 Mich 395, 399; 572 NW2d 210

(1998). Protected activity consists of: (1) reporting to a public body a violation a suspected violation of a law, regulation, or rule; (2) being about to report such a violation; or (3) being asked by a public body to participate in an investigation. MCL 15.362. A nonreporting employee must establish being about to report a violation or a suspected violation by clear and convincing evidence. MCL 15.363(4). If a plaintiff succeeds in establishing a prima facie case, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the adverse action. If the defendant carries this burden, the plaintiff must show that the defendant's legitimate reason was merely a pretext for the adverse action. *Phinney v Perlmutter*, 222 Mich App 513, 563; 564 NW2d 532 (1997).

The undisputed evidence showed that plaintiff was discharged from his employment with defendant. No evidence showed that plaintiff actually reported a violation or suspected violation of a law, regulation, or rule to a public body. Therefore, to establish a prima facie claim under the WPA, plaintiff was required to establish that he was about to report a violation or suspected violation of a law, regulation, or rule to a public body, and that a causal connection existed between this protected activity and his discharge. *Chandler, supra*. In his deposition, plaintiff stated that he complained to Tonkavich about the harassment by Gil, the threats of violence from members of a hockey team, and the possession or sale of controlled substances by employees on the Arena premises, and threatened to report the incidents to the police or to retain a lawyer if Tonkavich did not take steps to remedy the problems.[1] But no evidence showed that plaintiff did more than simply threaten to make a police report or to retain a lawyer if Tonkavich did not address the problems. An employee who is about to report a violation or a suspected violation is actually on the verge of reporting. *Shallal v Catholic Social Services*, 455 Mich 604, 621; 566 NW2d 571 (1997). A conditional threat to report a violation or suspected violation unless the employer addresses the situation, without more, does not support a finding that an employee was on the verge of making such a report. *Id.* at 615; *Chandler, supra* at 402; *Roberson, supra* at 327. The evidence showed that plaintiff made such a comment or threat on several occasions, but never took any concrete action. The lengthy period of time between plaintiff's threats of reporting and his discharge suggests that plaintiff was not discharged before he could report a violation. *Shallal, supra* at 612. Plaintiff failed to show that a question of fact existed as to whether he was about to report a violation or suspected violation of a law, regulation, or rule to a public body. MCL 15.363(4).[2] The trial court erred by denying defendant's motion for summary disposition of Count I of plaintiff's complaint.

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[1] In support of his response to Bay County's motion for summary disposition, plaintiff submitted an affidavit in which he stated that on the occasions when he spoke to Tonkavich about the problems he "fully intended" to file a report, but refrained from doing so at Tonkavich's request. A party cannot create a question of fact by submitting an affidavit that contradicts his prior deposition testimony. *Dykes v Williams Beaumont Hosp,* 246 Mich App 471, 480; 633 NW2d 440 (2001).

[2] Defendant also argues that the trial court erred in finding that a question of fact existed as to whether its stated reason for terminating plaintiff's employment was merely pretextual. We need not decide this argument in light of our conclusion that plaintiff failed to show that he was engaged in a protected activity.

Next, defendant argues that the trial court erred by denying its motion for summary disposition of Count III of plaintiff's complaint alleging intentional infliction of emotional distress that was brought pursuant to MCR 2.116(C)(7)[3] and (8). The trial court denied defendant's motions, finding that if Gill's conduct could be characterized as intentional infliction of emotional distress, defendant could be held vicariously liable for that conduct. A review of the trial court's comments at the hearing suggest that the trial court held that because it found that questions of fact existed as to whether Gill's conduct constituted intentional infliction of emotional distress, it denied defendant's motion for summary disposition of Count III on that basis and not on the basis that defendant was not entitled to governmental immunity.

The trial court erred in concluding that defendant could be held vicariously liable if plaintiff could establish that Gill's actions constituted intentional infliction of emotional distress. A governmental agency cannot be held vicariously liable for the intentional torts of its employees. *Payton v Detroit*, 211 Mich App 375, 393; 536 NW2d 233 (1995), citing *Alexander v Riccinto*, 192 Mich App. 65, 71-72, 481 NW2d 6 (1991). Defendant was entitled to summary disposition of plaintiff's claim of intentional infliction of emotional distress pursuant to MCR 2.116(C)(7). Similarly, plaintiff alleged in his complaint that Gill's conduct constituted the intentional infliction of emotional distress and that defendant was liable for Gill's actions under a theory of respondeat superior. But, as stated above, a governmental agency cannot be held vicariously liable for the intentional torts of its employees. *Payton, supra.*. The fact that

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[3] Plaintiff argues that this Court lacks jurisdiction to decide defendant's claim of appeal regarding denial of the motion for summary disposition pursuant to MCR 2.116(C)(7) because defendant erroneously asserted this appeal as an appeal of right pursuant to MCR 7.202(6)(a)(v) and MCR 7.203(A)(1), rather than seeking leave to appeal. In *Newton v Michigan State Police*, 263 Mich App 251; 688 NW2d 94 (2004), a panel of this Court held that an appeal of right under MCR 7.203(A) and MCR 7.202(6)(a)(v) is available only from an order in which the denial of summary disposition is "directly based on a finding that the moving party is not entitled to governmental immunity and not to a situation where, although a claim of governmental immunity has been asserted the trial court denied a summary disposition motion because the party has stated a sufficient factual case to avoid summary disposition." *Id.* at 256. However, in *Walsh v Taylor*, 263 Mich App 618; 689 NW2d 506 (2004), another panel of this Court purported to create a conflict with Newton and held that, were it not bound by the decision in *Newton* by virtue of MCR 7.215(J)(1), it would hold that any order that denies governmental immunity is a final order that may be challenged as of right pursuant to MCR 7.203(A) and MCR 7.202(6)(a)(v). The request for a special panel was denied. See 263 Mich App 801; 689 NW2d 778 (2004). Nevertheless, this Court may treat defendant's claim of appeal as a granted application for leave to appeal in order to consider the merits of the substantive issue raised by defendant. *Newton, supra* at 256; *Walsh, supra* at 626. In this case, we conclude that it is appropriate to so treat defendant's claim of appeal as a granted application for leave to appeal so that all of defendant's asserted issues may be reviewed in light of the fact that this Court granted two applications for leave to appeal arising out of the same case.

plaintiff might have stated a claim for intentional infliction of emotional distress on which relief could be granted against Gill, individually, would not result in imposition of liability on the part of defendant. The trial court erred by denying defendant's motion for summary disposition for Count III pursuant to MCR 2.116(C)(8).

In Docket Nos. 257363, 257364, and 257413, we reverse and remand for entry of an order granting summary disposition in favor of defendant on Counts I and III of plaintiff's complaint. Jurisdiction is not retained.

/s/ E. Thomas Fitzgerald
/s/ Peter D. O'Connell
/s/ Kirsten Frank Kelly